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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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DEC 19 1994

In the Matter of)

Revision of Part 22 of the)
Commission's Rules Governing)
the Public Mobile Service)

CC Docket No. 92-115,
94-46 and 93-116

To: The Commission

PETITION FOR RECONSIDERATION

Western Wireless Corporation ("Western"), by its attorneys and pursuant to Section 1.429 of the Federal Communications Commission's ("Commission's") Rules, 47 C.F.R. §1.429, respectfully submits this petition for reconsideration and clarification of the Commission's Report and Order released September 9, 1994 in the captioned proceeding.^{1/}

BACKGROUND AND STANDING

Western, through its subsidiaries, operates cellular telephone systems in over seventy markets throughout the United States. An affiliate of Western, PN Cellular, Inc., has been actively involved in the unserved area proceedings before the Commission.^{2/} Therefore, Western is an "interested person" pursuant to Section 1.429 of the Rules with respect to the Commission's comprehensive

^{1/} Report and Order, Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, FCC 94-201, CC Docket No. 92-115, 94-46 and 93-116 (rel. September 9, 1994), 59 Fed. Reg. 501 (Nov. 17, 1994). Pursuant to Sections 1.429 and 1.4(b) of the rules, this petition is timely filed.

^{2/} See, e.g. Memorandum Opinion and Order on Reconsideration, Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, CC Docket No. 90-6, 8 FCC Rcd. 1363 (rel. February 19, 1993).

rewrite of Part 22 of the Rules.

Western seeks clarification of three issues raised by the Report and Order. First, the real party in interest disclosures required pursuant to revised Section 22.108, which replaces current Section 22.13(a)(1), should be limited to the applicant's subsidiaries and affiliates that are engaged in Commercial Mobile Radio Service ("CMRS"). Second, the Commission should confirm that, pursuant to revised Section 22.947, a construction period of twelve months following the grant of the application applies in the event that a licensee or a third party pursuant to a contract with a licensee files a Form 401 application at any time during the licensee's five-year build-out period. Third, the Commission should confirm its current informal policy and codify this policy in the text of the new rules that contract extensions proposing the location of a new cell site by Carrier A in Carrier B's adjacent market require the filing and grant of a Form 401 before such an extension may be effectuated. Discussions in support of these three requests are set forth below.

DISCUSSION

I. Real Party in Interest Disclosures

Section 22.13(a)(1), which is being recodified and amended as Section 22.108, by its terms is limited to real party or parties in interest "engaged in the Public Mobile Service." The language of Real Party in Interest Disclosure is to the same effect:

The real party in interest provisions were adopted to prevent an applicant from filing numerous applications in the same geographic area under different names. Thus,

the entities required by these provisions [Sections 22.13(a)(1)(A)-(C)] to be listed are only those entities which have financial interests in PMRS licensees, permittees or applicants.

Real Party in Interest Disclosure Requirements in the Public Mobile Radio Service, 52 RR 2d (P&F) 1053, 1053 (1982).^{3/} The new Section 22.108 does not include the express limitation, found in Section 22.13, to parties that are "engaged in Public Mobile Service." However, in the "Detailed Discussion of Part 22 Rule Amendments" set forth in the Report and Order, the Commission stated:

The intent of the NPRM was to propose the retention of the substance of §22.13(a)(1) as it existed prior to the NPRM with respect to the disclosure of real parties in interest.

Report and Order at A-9. Furthermore, in the Notice of Proposed Rule Making, Revision of Part 22 of the Commission's rules governing the Public Mobile Services, 7 FCC Rcd. 3658 (1992), the

^{3/} The Commission has established that "Section 22.13(a)(1) of the rules does not require submission of information concerning subsidiaries or affiliates other than those which has financial interests in Part 22 licensees, permittees or applicants, in the same geographical area [footnote omitted]." Eldon L. Huebner d/b/a Cellutech, 6 FCC Rcd. 736, 738 para. 17 (Mob. Serv. Div. 1991). See also Cellular One of Terre Haute, 2 FCC Rcd. 4752, 4752 para. 5 (Mob. Serv. Div. 1987). For MSAs 121-305, the Commission required non-wireline applicants to disclose fully members to pre-filing and post-filing settlement agreements even when those interests were less than one percent. Eldon L. Hueber, 6 FCC Rcd. at 738 para. 15. Also, the Commission requires that, in the case of partnership applicants, the name, address, citizenship and ownership interest of each partner be disclosed. See old Section 22.13(a)(1)(iv) and new Section 22.108(d). This requirement, which applies to partnerships but not corporate entities, undoubtedly reflects the historical use of abusive settlement partnerships and the unique control and alien issues that may arise in a partnership context. See, generally, Eric Fishman, 65 RR 2d (P&F) 694 (Com. Car. Bur. 1988); Eldon L. Hueber, 6 FCC Rcd. at 738 para. 15.

Commission stated that the revisions were proposed in order to eliminate "unnecessary information collection requirements," 7 FCC Rcd. at 3658, and that:

The proposals contained in this Notice are meant to simplify and ease the regulatory burden on all Public Mobile Services applicants and licensees consistent with the Commission's established public interest objectives.

Id. at 3662. Because the stated intent of the Commission was to retain the substance of the current Section 22.13(a)(1) and to ease rather than magnify the information requirements and regulatory burden imposed on applicants consistent with public interest objectives, it appears that the omission of the qualifying language "engaged in Public Mobile Service" was inadvertent.

Analogous real party in interest disclosure requirements in the context of commercial broadcast stations are limited to relevant interests in broadcast, cable or newspaper entities. See FCC Form 301, Section II, item 4h; FCC Form 315, Section II, item 4h; FCC Form 323, item 3. For example, FCC Form 301 requires that the applicant list:

All other ownership interests of 5% or more (whether or not attributable), as well as any corporate officership or directorship, in broadcast, cable, or newspaper entities in the same market or with overlapping signals in the same broadcast service

Similarly, in Broadband PCS, the Commission has limited the real party in interest disclosure requirements of Sections 24.813(a)(1) and (2) for purposes of the Form 175 short-form applications to interests in CMRS licensees or applicants. Order, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253 (rel. October 25, 1994) at 3 para. 4. There

is no reason that the Commission should impose a fundamentally different - and substantially more burdensome - set of real party in interest disclosure requirements on future cellular applicants than that currently applying in the cellular service or pertaining to applicants in other services. Accordingly, the Commission should limit the disclosures required by new Section 22.107 to entities which have financial interests in CMRS licensees, permittees or applicants.

II. Confirmation of Twelve-Month Construction Period Following Grant of Form 401

The Commission has confirmed that in all markets for which the five-year fill-in period has expired and for which a Form 401 has been filed before the relevant expiration date, the area applied for will remain protected until the Commission has acted upon the relevant application by a final order.^{4/} This result is the same whether the application is filed by the licensee of the market or a third party who has entered into a contract with licensee to construct in that market, and in each case the applicant has a twelve-month period to construct, commencing on the date of the grant of the application by final order.^{5/}

There is no indication that the Commission has modified this approach. The "Detailed Discussion of Part 22 Rule Amendments" set

^{4/} Memorandum Opinion and Order on Reconsideration, Amendment of Part 22 of the Commission's Rules, 8 FCC Rcd. 1363, 1365 n. 3 (1993).

^{5/} See Sections 22.903(d)(2) and 22.43(c) of the earlier Rules.

forth in the Report and Order states that Section 22.946, which replaces old Section 22.43(c), "reflects the existing requirements." Report and Order at A-43. New Section 22.947(b) explicitly authorizes a licensee to partition its market during the five-year build-out period, by allowing other parties to apply by the filing of a Form 401 for a new cellular system on that channel block within the market, consistent with current practices. Table H-1 to Section 22.946(a) provides a general twelve-month construction period unless another is specified.

However, the language of Section 22.947 presents a possible ambiguity that might be read to suggest that construction pursuant to the grant of a Form 401 must be completed within the five-year build-out period, even if this period ends prior to the termination of the separate twelve-month construction period. Section 22.947(b)(2) states that the five-year build-out period

is not extended or affected in any way by the initial authorization of any subsequent cellular systems pursuant to paragraph (b) of this Section.

Paragraph (b), as described above, addresses partitioned markets. The clear intent of this language is that a licensee's partitioning of its market cannot be used by the licensee to extend the five-year build-out period pertaining to the market in general. If read literally, however, one might assert that the section provides that the same five-year build-out period applies to the construction pursuant to the granted Form 401. This reading cannot have been intended, and it is requested that the Commission clarify that the full twelve-month construction period provided in new Section

22.946(a) applies to all granted Forms 401, whether filed by the licensee or a third party pursuant to a partitioning contract, even if this twelve-month period ends after the termination of the five-year build-out period.

III. Codification of Procedure for Contractual Extensions Resulting in Location of Cellular Transmission Facilities in Another's Market

As a matter of informal policy, the Common Carrier Bureau's Mobile Services Division ("MSD") in the past has routinely required the filing of a Form 401 in the event that a cellular carrier contemplated a contractual Service Area Boundary ("SAB") extension into an adjacent market where the cell site itself was to be located in the adjacent market.^{5/} This policy had not been codified in the prior version of the rules, nor is it codified in the new one.

In order to promote consistency of practice and clarity of the public records, the Commission should confirm that its policy remains that contractual SAB extensions resulting in the location of facilities within the adjacent market require the filing of a Form 401 by the carrier wishing to locate a transmitter in another carrier's market. The Commission should also codify this policy in its new rules.

^{5/} This case should be distinguished from the case where a carrier contemplated a contractual SAB extension into an adjacent market where the site was to be located within the carrier's own market, in which event the carrier would be required to file a Form 489 notification only.

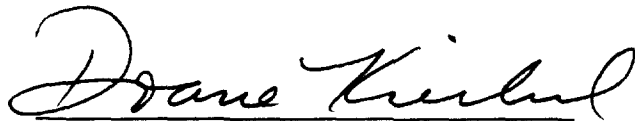
CONCLUSION

In view of the foregoing, it is hereby respectfully requested that the Commission (i) clarify that the real party in interest disclosures required by new Section 22.108 be limited to interests in CMRS providers, (ii) confirm that the relevant period for construction in a cellular market pursuant to a Form 401 filed by the licensee or a third party prior to the expiration of the five-year build-out period is twelve months after the final grant of the application, regardless of the termination of the licensee's five-year build-out period, and (iii) confirm and codify the MSD's prior policy that the filing of a form 401 is the proper procedure for a contractual SAB extension resulting in the location of a cell site in an adjacent market.

Respectfully submitted,

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